United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C.

Date Issued: February 2, 1998

Case No.: 97 INA 210

In the Matter of:

ROBERT LOVERD,
Employer

On behalf of:

TERESTIA V. GASPAR,
Alien

Appearance: D. C. Gallagher, Esq., of New York, New York

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of TERESTIA V. GASPAR (Alien) by ROBERT LOVERD (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa, if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability. [2]

STATEMENT OF THE CASE

This case involves an application (ETA 750A) for permanent full time employment of the Alien as a Domestic Cook with the following duties:

> Plan, cook, serve meals for family in private home. Prepare seasonings and all ingredients. Cook fresh vegetables, meats, fish, poultry according to employer's desires. Prepare and bake fresh breads, pastries and cakes. Shop for groceries. Assist with entertaining. Clean kitchen and all cooking equipment.

AF 04. The position was classified as Cook (Household) Live out, under DOT Occupational Code No. 305.281-010. In the form ETA 750A the Employer said the Alien was to work a basic 40 hour week with no overtime anticipated. The hours were to be from 12:00 noon to 8:00 p.m., at the rate of $12.81 per hour; and the salary offered was $500 per seek. No formal education was demanded, but Employer required two years of experience in the Position Offered. After the job was advertised, sixteen applicants were referred, but none was hired for the position for the reasons stated in the Employer's report. AF 46-51.

Notice of Findings. On May 9, 1996, the Notice of Findings stated that, subject to the Employer's rebuttal, the application would be denied on grounds that the duties described in the ETA 750A did not appear to constitute the full-time position required by 20 CFR § 656.3. The CO advised the Employer that he could rebut this finding by amending the job duties or by submitting evidence that the position constitutes full time employment and has been customarily required by the Employer.

After stating specific information that the CO required the Employer to submit as proof, the NOF also noted that the Employer had rejected one or more otherwise qualified applicants on grounds that they did not meet his minimum requirement of two years of experience in cooking duties **in a private home**.[3] The CO observed that, "Employer has made clear in consideration of referred workers that 'household' cook experience has been rigorously and literally applied as a standard, dismissing other cook experience." The CO then said,

---

[2]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

[3]The CO underlined this phrase in the NOF. AF 61.

> We find this stand insupportable. Any cook experience is held to be transferrable to employer's cooking and cooking related requirements and attendant duties. There seems no reason why a cook with commercial, institutional experience or cook experience included as a part of household worker duties can not perform integral duties of job.

AF 61. The CO then remarked that the Employer's experience requirement is unrealistic and is restricted to the Alien's background. Describing this requirement as restrictive under 20 CFR § 656.21(b)(2)(i), the CO then discussed the evidence required to rebut this reason for the rejecting certification. 60-61.

Finally, the CO cited 20 CFR § 656.21(b)(6) as authority for the finding that the Employer rejected U. S. job applicants for reasons that were neither lawful nor job related. The CO then discussed the resumes and Employer's rejection of Mr. Mendoza, Ms. Palmer, and Ms. Loison, indicating that all of them were qualified and that Employer's rejection of their applications was inconsistent with 20 CFR § 656.21(b)(6).

Rebuttal. By way of rebuttal the Employer addressed all of the issues the CO noted in the NOF. The Employer described the job duties and asserted that they were sufficient to require full time help. The Employer then confirmed the finding that the Employer had restricted consideration to candidates who had experience as a household cook and agreed that any cook amy possess the technical experience required. Employer insisted, however, that his special family circumstances were so unique that this job could only be filled by "a worker with a sensitivity and personal approach which is gained only by working in the atmosphere of private homes providing personal service." AF 120. The same contentions then were restated in Employer's response to the requirement for proof of business necessity under 20 CFR § 656(b)(2)(i). The Employer addressed and confirmed the CO's findings that he had rejected Mr. Mendoza on grounds that his experience did not include work as a Domestic Cook. The Employer contended that his rejection of Ms. Palmer and Ms. Louison was based on the fact that their domestic experience was not primarily that of a cook, even though cooking was included among the duties that they performed. The Employer argued in conclusion that he was entitled to demand two years of full time experience as a Domestic Cook, only, in filling this position.

Final Determination. In the Final Determination issued August 14, 1996, the CO denied Employer's application for certification on grounds that Employer's rebuttal failed to sustain his burden of proof under 20 CFR §§ 656.21(b)(2), b)(6), and (b)(8), and under 20 CFR § 656.24(b)(2)(ii). AF 127-131. Addressing Employer's discussion of the need for patience and understanding Employer required in interactions with his wife, a member of the household to be served, the CO said,

> We do not contest that a household cook is faced with a situational work place different from that of a cook working in restaurant and other places. We do not find that this automatically means such a cook, admitted [by the] employer [to be] able to perform the cook duties, cannot respond appropriately to the characteristics of the household and/or its inhabitants. Patience and understanding are individual attributes, not occupational

> skills. While one occupation may foster them more than another, the job of a cook in restaurants, commercial business, and institutional environments would seem to routinely test only one's tolerance in these areas. Absent concerted consideration through an interview it is not feasible to write off a worker's tolerance capacities.

AF 129-130. For these reasons the CO found that the resumes of all three of these employees merited further inquiry as to their qualifications by a job interview and further investigation, since each of them presented skills and background that reasonably met the criteria Employer said he applied in his rebuttal discussion. As no interview was granted apparently qualified U. S. job applicants, the CO denied the alien labor certification requested by the Employer.

Appeal. The Employer appealed the denial of certification on September 16, 1996, and later filed a brief. Employer's primary contention was that, "the decision of the Certifying Officer is overly broad and [is] based upon an erroneous interpretation of the regulations contained at 20 CFR 656.24(b) (2)(ii)... ." Employer relied on the differences between cooking for a family in their home and cooking an a commercial or institutional setting, basing his reasoning on the circumstance that the DOT presents a separate job description for a Domestic Cook. The Employer continued:

> Moreover, the position of domestic cook requires certain skills and attributes, including but not limited to the ability to work independently and with minimal supervision, the ability to cater to particular needs and specific dietary requests of individual family members, and the ability to work on a flexible schedule and to entertain guests on short notice, which are not readily learned in a restaurant or institutional environment.

The Employer further complained that the CO applied 20 CFR § 656.24(b)(2)(ii) too broadly by requiring him to conduct a perso-nal interview with each and every applicant for a job, even when the Employer felt that the applicant involved was not qualified through a combination of education, training and experience. The Employer strongly suggested he relied on his assumption that the CO agreed or should have agreed with his rebuttal version of the novel personal standard he applied in deciding whether or not an otherwise experienced cook could provide the food service needed for his household. Construing the decided cases according to this premise, the Employer requested the reversal of the CO's denial of certification.

Discussion

The Employer has pointed to the failure to the CO to find his stated hiring criteria defective, even though he clearly stated that the position he offered was for a "Domestic Cook." The DOT job description for a Domestic Cook is as follows:

> 305.281-010 **COOK (domestic ser.**) Plans menus and cooks meals, in private home, according to recipes or tastes of employer: Peels, washes, trims, and prepares vegetables and meats for cooking. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders food-stuffs. Cleans kitchen and cooking

> utensils. May serve meals. May perform seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. May prepare fancy dishes and pastries. May prepare food for special diets. May work closely with persons performing household or nursing duties. May specialize in preparing and serving dinner for employed, retired, or other persons and be designated Family-Dinner Service Specialist (domestic ser.). ...

At no point does this description of the standard duties of this position coincide with the Employer's hiring criterion that this job could only be filled by "a worker with a sensitivity and personal approach which is gained only by working in the atmosphere of private homes providing personal service," which he did not reveal until his rebuttal. *Supra*. As there is no evidence cited to support the CO's comment that the standard Employer adopted is specially chosen to fit the qualifications of the Alien, that will not be discussed. On the other hand, it is now clear from the rebuttal that this Employer applied an undisclosed job requirement that was not mentioned at any point in either his application or the DOT description of the work of a Domestic Cook.

For the reasons that appear in Employer's argument, an expression of his reasons for rejecting three apparently qualified U. S. workers, the CO should be affirmed because he would not even interview them because of a criterion that the Employer did not reveal until his rebuttal statement. It is a fundamental principle that an employer may not reject a U. S. worker based upon an undisclosed job requirements. **United Const. Weather Proofing Co.**, 92 INA 172 (Mar. 26, 1993); **United Calibration Corp.** 91 INA 075 (Mar. 24, 1993); **Armando's Italian Restaurant,** 92 INA 051 (Mar 23,. 1993); **M. K. Catering Consultants, Inc.,** 92 INA 010 (Jan. 29, 1993).[4] Employer's preference that the worker have "sensitivity and personal approach" did not become a job requirement until the Employer applied it to explain or excuse his refusal to interview three U. S. applicants for this position. **Southern Connecticut State University,** 90 INA 384 (Dec. 9, 1991).

This unusual criterion, moreover, materially exceeded the job duties stated in Employer's application, and its unexpected disclosure by the Employer in the rebuttal was inconsistent with both the DOT and his application. In the report on recruitment, for example, the Employer expressly noted the domestic work of both Ms. Palmer and Ms. Louison and inexplicably treated their background in domestic service as a reason to reject them on the basis of their resumes, only. We also observe that the Employer rejected Mr. Mendoza for reasons that had nothing whatsoever to do with the new found argument that the applicant's experience as a cook was not in domestic service. Because the argument in Employer's rebuttal and brief is at odds with its application for alien labor certification, the DOT, and its recruitment report, it lacks credibility and is not entitled to any weight in the disposition of this matter. For these reasons we agree with the CO's finding that the Employer failed to sustain its burden of proof under 20 CFR §§ 656.21(b)(2), b)(6), and (b)(8).

---

[4]For other cases see **Lorenzana Foods Corp.**, 91 INA 020 (Jan. 26, 1993); **L. M. C. Corp.,** 91 INA 034 (Jan. 26, 1993); **Travers Associates, Inc.**, 91 INA 115 (Jan. 6, 1993); and **Electronic Development Corp.,** 91 INA 3243 (Dec. 16, 1992).

Summary. While the Act does not prevent the Employer from imposing such personal preferences as he may fancy in choosing a Household Cook, to secure certification under the Act the Employer must comply with its provisions and meet its criteria. The CO clearly pointed out in the Final Determination that the Employer's Application and Rebuttal are inconsistent with the Act and regulations in both the job that he offered and in the conditions he imposed on his hiring of U. S. workers for this job. Accordingly, we concludse that the CO's rejection of the Employer's application for labor certification in behalf of this Alien was adequately supported by the evidence of record and that the following order should enter.

ORDER

The Certifying Officer's decision denying certification under the Act and regulations is hereby Affirmed.

For the Panel:

_____

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.